No. 438

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

H. E. WHITE, CHARLES R. HALL, JENNINGS LILLY, W. C. WHITE, and JOHN RONCAGLIONE,
Appellants,

v.

ALBERT ANSON, JR., H. M. BEDDOW, A. S. THOMAS, JR., H. G. KENNEDY and DR. H. R. GLASS, MEMBERS OF THE BOARD OF EDUCATION OF KANAWHA COUNTY, WEST VIRGINIA,
Appellees.

APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPELLEES' MOTION TO DISMISS

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move to dismiss the appeal herein and in support of such motion respectfully show the following:

I. STATEMENT OF THE ISSUES ON APPEAL

The question sought to be presented by this appeal is the appellants' claim that the refusal of The Board of Education of the County of Kanawha, a public corporation created under general law by the Legislature of West Virginia, to grant them permission to use a public school building for a religious meeting of a religious sect to which appellants belong, known as Jehovah's Witnesses, violates the constitutional rights of appellants contrary to the First Amendment to the Constitution of the United States and the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.

Appellants also claim that the refusal of The Board of Education of the County of Kanawha to permit the use of school property and facilities by religious groups and organizations while permitting their use by other groups and organizations, constitutes a denial of the equal protection of the laws, a denial of the right of assembly, a denial of the right of free speech, a denial of the right of equal justice, and constitutes class legislation in violation of the Constitution of the United States and the First, Fifth and Fourteenth Amendments thereto as well as certain provisions of the Constitution of the State of West Virginia.

The appellants further alleged in their petition presented to the Circuit Court of Kanawha County, West Virginia, and to the Supreme Court of Appeals of West Virginia that under the provisions of section 19, article 5, Chapter 18 of the Code of West Virginia, 1931, (Michie's West Virginia Code of 1955, section 1780) county boards of education "are authorized by statute to permit the use of school property as a place

of religious assembly"; that "The use of school buildings as civic centers under the provisions of Section 1780 of the Code of West Virginia" is permitted; that the attorneys of The Board of Education had illegally misinterpreted the Constitution of West Virginia; that the term "other community activities" used in the statute includes religious uses, such as religious meetings and services of sects similar to Jehovah's Witnesses to which appellants belong.

These allegations raise the following non-federal questions:

(1) May a county board of education permit the use of public school buildings for purely religious purposes under West Virginia law?

(2) Do the provisions of Section 15, Article 3 of the Constitution of West Virginia prohibit the use of public school buildings as places of religious worship or for religious meetings and services?

II. THE QUESTIONS SOUGHT TO BE RAISED CANNOT BE MADE THE BASIS OF APPEAL

Under 28 U.S.C.A. section 1257 the judgment or decree of the highest court of the state may be reviewed by the Supreme Court of the United States by appeal:

(1) Where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) Where is drawn in question the validity of a statute of any state on the grounds of its being repugnant to the Constitution, treaties or laws

of the United States, and the decision is in favor of its validity.

This attempted appeal does not involve the validity of a treaty or statute of the United States. Consequently, in order that there may be jurisdiction to review the judgment of the Supreme Court of Appeals of West Virginia, there must be drawn in question in this case the validity of a statute of the State of West Virginia on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the judgment of the Supreme Court of Appeals of West Virginia must be in favor of its validity.

The only statute of the State of West Virginia involved in this case is section 19, article 5, Chapter 18 of the Code of West Virginia, 1931, as amended, (Michie's West Virginia Code of 1955, section 1780), which defines and enumerates the uses and purposes, other than school purposes, for which public school buildings may be used. It provides:

> "The board of education of any district or independent district shall have authority also to provide for the free, comfortable and convenient use of school property to promote and facilitate frequent meetings and associations of the people for discussion, study, recreation and other community activities, and secure, assemble and house materials for use in the study of farm, home and community problems, and may provide facilities for the dissemination of information useful on the farm, in the home, or in the community."

The appellants do not contend that this statute is invalid on the ground that it is repugnant to the Constitution, treaties or laws of the United States. On

the contrary, appellants in their petition to the State Court urged this statute as authorizing county boards of education in West Virginia to permit the use of public school buildings for religious meetings and services. The real objection of the appellants is the claimed unconstitutionality of the result obtained by the use of the statute, not the unconstitutionality of the statute itself. They assert, rather, that there has been systematic discrimination against them in the administration of the statute by The Board of Education of the County of Kanawha in that the Board of Education has permitted other religious organizations to use public school buildings for meetings and services while denying them the same use. To this effect are the allegations in paragraphs 12, 20, and 21 of appellants' petition to Supreme Court of Appeals of West Virginia. (See pages 23, 27 and 28 of the typewritten transcript of the record filed with the Clerk.) Such an averment has uniformly been held not to draw in question the validity of the statute. Thus, an appeal will not lie. *Zucht* v. *King*, (1922) 260 U. S. 174, 67 L. Ed. 194; *Charleston Federal Savings & Loan Association* v. *Alderson*, (1944) 324 U. S. 182, 185, 89 L. Ed. 857; *Jett Bros. Distilling Co.* v. *Carrollton*, (1919) 252 U. S. 1, 64 L. Ed. 421. In *Zucht* v. *King*, (1922) 260 U. S. 174, 67 L. Ed. 194, the Court said:

> "The bill contains also averments to the effect that, in administering the ordinance, the officials have discriminated against the plaintiff in such a way as to deny to her equal protection of the laws. These averments do present a substantial constitutional question. *Neal* v. *Delaware*, 103 U. S. 370, 26 L. Ed. 567. But the question is not of that character which entitles a litigant to review by this court on writ of error. The

> question does not go to the validity of the ordinance; nor does it go to the validity of the authority of the officials . . . . This charge is of an unconstitutional exercise of authority under an ordinance which is valid."

At no point was the validity of the statute attacked in the state courts. For appeal to lie the validity of the statute must be drawn in question. The assertion of a right, privilege or immunity under the Federal Constitution affords no basis for appeal from a state court. *Mergenthaler Linotype Co.* v. *Davis*, (1919) 251 U. S. 256, 64 L. Ed. 255.

III. THE JUDGMENT OF THE STATE COURT RESTS ON AN ADEQUATE NON-FEDERAL BASIS

Under the West Virginia statutes governing the procedure to be followed in proceedings for mandamus, the relator or petitioner files his petition with the circuit court of the county having jurisdiction of the matter praying that a rule be issued against the defendants to show cause why a rule in mandamus should not issue. No process is issued against the defendants named in the petition and the petition of the relator is considered *ex parte*. If the court is satisfied that the relator has stated a *prima facie* case in his petition, i. e., that there is a clear right to relief sought, a rule to show cause is issued and served upon the defendants. After the service of the rule upon them, the defendants may appear and plead. If the court is of the opinion that the petition does not state a case warranting the issuance of the extraordinary writ of mandamus, the refusal of the relief sought is endorsed on the petition. The relator may then present the petition together

with the court's refusal endorsed thereon to the Supreme Court of Appeals. See Article 1, Chapter 53 of the Code of West Virginia, 1931, as amended. The procedure followed in the Supreme Court of Appeals is the same as in the circuit court. The petition is again considered *ex parte* and the writ issued or refused.

In passing upon the appellants' petition, the Circuit Court of Kanawha County held:

> "It is well settled in West Virginia that a board of education of a school district is a corporation created by the Legislature, and that it has only such powers as are expressly vested in it by statute or those that fairly arise by necessary implication from the powers expressly given. *Herald* v. *Board of Education*, 65 W. Va. 765; and *Dooley* v. *Board of Education*, 80 W. Va. 648. The only statute relative to the present situation is that part of Code 18-5-19 which reads as follows:
>
> "The board of education of any district or independent district shall have authority also to provide for the free, comfortable and convenient use of any school property to promote and facilitate frequent meetings and associations of the people for discussion, study, recreation and other community activities, and may secure, assemble and house material for use in the study of farm, home and community problems, and may provide facilities for the dissemination of information useful on the farm, in the home, or in the community."
>
> "Although it is clear that the foregoing statute does not expressly provide for the use of school buildings for religious purposes, it may be argued that by implication the statute is suscepti-

> ble of such an interpretation. This, however, is debatable. It is my considered view that the statute is not susceptible of the interpretation that the school board may permit school buildings to be used purely for religious purposes. Moreover, to say the least, the matter is so uncertain that, in the absence of a decision by the Supreme Court of Appeals upholding such right, I do not believe that I would be warranted in granting the relief prayed for in this mandamus proceeding, in view of the rule that a writ of mandamus may only be granted when the legal right is clear."

The Supreme Court of Appeals likewise denied appellants' petition for a writ of mandamus but without stating any ground for its decision. The constitutional objections raised by the appellants were not expressly passed on by the Supreme Court of Appeals of West Virginia.

The allegations of the petition effectively raise questions of state law relating to the power and authority of county boards of education to permit nonscholastic uses of public school buildings other than those enumerated and authorized by statute.

The Circuit Court of Kanawha County did not pass upon the constitutional questions which appellants attempted to raise, but decided the cause upon a nonfederal basis, namely, the lack of statutory authority in a board of education to permit school buildings to be used for purely religious meetings.

It is well settled in West Virginia that a county board of education is a corporation created by the Legislature, and that it has only such powers as are

expressly conferred upon it by statute or those that fairly arise by necessary implication from the powers expressly given. *State* v. *Rouzer*, (1945) 127 W. Va. 392, 32 S. E. (2d) 865; *Shinn* v. *Board of Education*, (1894) 39 W. Va. 479, 20 S. E. 604; *Honaker* v. *Board of Education*, (1896) 42 W. Va. 170, 24 S. E. 544; *Dooley V. Board of Education*, (1917) 80 W. Va. 648, 93 S. E. 766; *Madachy* v. *Huntington Horse Show*, (1937) 119 W. Va. 54, 57, 192 S. E. 128; *Herald* v. *Board of Education*, (1909) 65 W. Va. 765, 65 S. E. 102; *State ex rel. Town of South Charleston* v. *Partlow*, (1949) 133 W. Va. 139, 55 S. E. (2d) 501.

In *Herald* v. *Board of Education*, 65 W. Va. 765, 65 S. E. 102, the court held in point 2 of the syllabus:

> "A board of education is a *quasi* corporation, existing only under statute, having only the powers given by statute and such implied powers as are absolutely necessary to execute such express powers. It cannot engage in business or make contracts outside its functions touching education. It cannot lease a school house lot for production of oil and gas."

And in *State ex rel. Town of South Charleston* v. *Partlow*, 133 W. Va. 139, 161, 55 S. E. (2d) 501, it was held:

> "The board of education of a school district is a corporation created by statute with function of a public nature expressly given and no other. It can exercise no power not expressly conferred or fairly arising by necessary implication, and in no other mode than that prescribed or authorized by the statute."

In the absence of express statutory authority, then the Board of Education is without power or authority

to permit the use of school buildings by religious groups for the purpose of worship or teaching or expounding their particular beliefs. The only statute relating to the uses and purposes, other than school purposes, for which a school building may be used is section 19, article 5, of Chapter 18 of the Code of West Virginia, 1931, as amended. It provides:

> "The board of education of any district or independent district shall have authority also to provide for the free, comfortable and convenient use of any school property to promote and facilitate frequent meetings and associations of the people for discussion, study, recreation and other community activities, and may secure, assemble and house material for use in the study of farm, home and community problems, and may provide facilities for the dissemination of information useful on the farm, in the home, or in the community."

This statute contains no express grant of authority to boards of education to permit the use of school buildings for meetings of religious sects. In fact, it is the intent of the statute to limit the purposes, other than school purposes, for which school buildings may be used to "community activities" in the nature of discussion, study and recreation. The fact that this statute enumerates the purposes, other than school purposes, for which a school building may be used and does not include meetings of religious sects, would imply by application of the doctrine *expressio unius est exclusio alterius* that such a use is prohibited. See *State* v. *Simms*, (W. Va. 1953) 77 S. E. (2d) 122; *Taylor* v. *Taylor*, (1909) 66 W. Va. 238, 66 S. E. 690; *Bischoff* v. *Francesa*, (1949) 133 W. Va. 474, 56 S. E. (2d) 865; *Harbert* v. *County Court of Harrison County*,

(1946) 129 W. Va. 54, 64, 39 S. E. (2d) 186. The doctrine of *expressio unius est exclusio alterius* has been held to be especially applicable to the construction and interpretation of statutes. *Tate* v. *Ogg*, (1938) 170 Va. 95, 195 S. E. 496.

The present statute, section 19, article 5, of Chapter 18 of the Code of West Virginia, 1931, was first incorporated into the general law of West Virginia by Chapter 2, Acts of the Legislature, 1919, and then was carried into the Code of West Virginia, 1931, as section 19, article 5, Chapter 18. Said Chapter 2, Acts of 1919, was entitled "An act to amend and re-enact Chapter 45 of the Barnes Code of 1916" and by said act of 1919 the whole of Chapter 45 of the Code of 1916 relating to education and schools was revised. Section 62, of Chapter 45 of the Barnes Code of 1916 provided as follows:

> "The trustees may allow the school house in their charge to be used for holding religious, political, or literary meetings and Sunday school and such other meetings as may be considered beneficial to the public generally, under such regulations for the care and cleaning thereof as they may prescribe; provided, that such meetings shall not interfere with the public schools."

Thus, prior to the enactment of the present statute the use of school buildings for religious and political meetings was expressly authorized. The statute also expressly permitted the holding of Sunday school. However, in revising this statute the Legislature of West Virginia saw fit to withdraw religious meetings from the purposes, other than school purposes, for which school buildings might be used and omitted religious

meetings from the enumeration in the statute. The omission of religious meetings as one of the purposes for which school buildings might be used is clear and convincing evidence of the intention of the Legislature of West Virginia to withdraw the statutory authority of a board of education to permit such use. *J. S. Taylor* v. *State Compensation Commissioner et al*, (W. Va. 1955) 85 S. E. (2d) 114. In this case it was held:

> "When parts of a prior statute are omitted from a later statute which revises the prior statute, the parts omitted are not to be revived by construction but are to be considered as annulled."

See also to the same effect *State* v. *Hinkle*, 129 W. Va. 393, 41 S. E. (2d) 107; *Elite Laundry Company* v. *Dunn*, 126 W. Va. 858, 30 S. E. (2d) 454; and *Grant* v. *Baltimore & Ohio Railroad Company*, 66 W. Va. 175, 66 S. E. 709.

From these rulings of the Supreme Court of Appeals of West Virginia as to the interpretation of the statute, it is clear that section 19, article 5, of chapter 18 of the Code of West Virginia, 1931, does not authorize a county board of education to permit the use of public school buildings in its charge for religious meetings and services. The Board of Education of the County of Kanawha could not, therefore, lawfully permit the use of school buildings under its control for meetings of religious sects nor grant such permission to appellants.

It is also well settled in West Virginia that mandamus will not be awarded to require the person to whom it should be directed to perform any act which he is without authority to perform. *State* v. *Mills*,

(1949) 132 W. Va. 580, 588-9, 53 S. E. (2d) 416; *State ex rel the City of Huntington* v. *George R. Hefley*, (1944) 127 W. Va. 254, 271, 32 S. E. (2d) 456; *Pardue* v. *County Court*, (1928) 105 W. Va. 235, 239, 141 S. E. 874; *State ex rel. Kelly* v. *State Road Commission*, (1926) 102 W. Va. 88, 132 S. E. 465. In the latter case it was held:

> "Mandamus will only go to protect a clear legal right, and will never lie to compel the performance of an act prohibited by law."

The same rule is recognized in *Ex Parte Rowland*, (1881) 104 U. S. 604, 612, and *Laclede Gas Light Company* v. *Murphy*, (1897) 170 U. S. 78, 95. In the latter case the Court said:

> "Mandamus lies to compel a party to do that which it is his duty to do, but can confer no new authority, and the party to be coerced must have the power to perform the act."

The judgment of the Circuit Court of Kanawha County, West Virginia, was expressly based upon this ground as evidenced by his opinion incorporated as appendix B to the appellants' jurisdictional statement filed herein. The Supreme Court of Appeals might likewise have rested its opinion upon the nonfederal ground that these appellants had shown no clear right to the relief sought.

It would also appear that under the Constitution of West Virginia the use of school houses as places of public worship or for religious meetings or services is prohibited. Section 15, Article 3, of the Constitution of West Virginia provides:

> "No man shall be compelled to frequent or support any religious worship, place or ministry whatsoever; nor shall any man be forced, restrained, molested or burthened, in his body or goods, or otherwise suffer, on account of his religious opinions or belief, but all men shall be free to profess, and by argument to maintain their opinions in matters of religion; and the same shall, in no wise, affect, diminish or enlarge their civil liberties; and the Legislature shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this state, to levy on themselves, or others, any tax for the erection or repair of any church for public worship, or for the support of any church or ministry, but it shall be left free for every person to select his religious instructor, and to make for his support, such private contracts as he shall please."

There is an apparent split of authority on the question as to whether such a constitutional provision prohibits the use of school buildings for religious meetings. The majority rule, however, denies the use of school buildings for religious purposes in the face of such provisions. *Spencer* v. *Joint School District*, (1875) 15 Kan. 259, 22 Am. Rep. 268; *George* v. *Second School District*, (1843) 6 Met. (Mass.) 510; *Dorton* v. *Hearn*, (1878) 67 Mo. 301; *Hysong* v. *Gallitzin School District*, (1894) 164 Pa. 629, 26 L.R.A. 203, 44 Am. St. Rep. 632; *Bender* v. *Streabich*, (1896) 17 Pa. Co. Ct. 609, affirmed 182 Pa. 251, 37 Atl. 853; *Spring* v. *School Directors*, (1900) 31 Pitts, L.J.N.S. (Pa.) 194.

In *Spencer* v. *School District*, 15 Kan. 259, 22 Am.

Rep. 268, it was held that the use of a public school house for even one religious or political gathering is illegal, since taxation is invoked to raise funds to erect the buildings, and taxation, being illegitimate to provide for any private purpose, will not lie to raise funds to build a place for a religious society, a political society, or a social club, and what cannot be done directly cannot be done indirectly.

In *State ex rel. McCollum* v. *Board of Education*, (1947) 333 U. S. 203, 92 L. Ed. 649, and *Everson* v. *Board of Education*, (1947) 330 U. S. 1, 91 L. Ed. 711, this Court stated that the use of tax-supported property for religious instruction is barred by the First Amendment. As stated in the Everson case, "No tax in any amount, large or small, can be levied to support any religious activities or institutions."

In *Herald* v. *Board of Education*, 65 W. Va. 765, 767, 65 S. E. 102, Judge Brannon, speaking for the court, had this to say on the subject of permitting school buildings to be used for religious purposes:

> "I quote the following from Spelling on Extra. Relief, sec. 648: 'The letting of property belonging to a municipal corporation for any unauthorized uses will be enjoined at the suit of resident tax payers; and the use of a school house for religious worship, when not expressly authorized, is held to warrant the granting of an injunction to restrain the officers of the school district from permitting such use at the suit of a tax payer, without his showing special damage, since he is without means of redress at law. School officers may be enjoined from leasing a public school house for the purpose of keeping a private school, and the use of a public school

> house for private purposes, such as the holding of religious or political meetings, social gatherings and the like, is unauthorized by law and may be restrained at the instance of any party injured thereby; and this, though a majority of the electors and taxpayers of the District assent to such use and an adequate rental is paid therefor; and it is immaterial in such case that the majority of the citizens and the Directors of the District have consented to the illegal use.' "

While it is true that Judge Brannon's statements in this regard may be considered as *obiter dicta*, yet they are an expression of the attitude of the Supreme Court of Appeals of West Virginia on the subject, and are indicative of the tendency of that court to follow the majority rule expressed in *Spencer* v. *School District*, 15 Kan. 259, 22 Am. Rep. 268.

There is yet another non-federal basis upon which the state court's decision might have rested. This proceeding in mandamus was instituted by the appellants against the individual members composing The Board of Education of the County of Kanawha. By section 5, article 5, of Chapter 18, of the Code of West Virginia, 1931, county boards of educations are made corporations and as such corporations must sue and be sued, plead and be impleaded. The statutory name of the Kanawha County Board of Education is "The Board of Education of the County of Kanawha". When a board or body of school officials is made a corporation by corporate name, suits against it on causes of action relating to school affairs must be in the corporate name. *Halliday* v. *Marchington*, 44 Ohio App. 132, 184 N. E. 698; *Johnson V. Common School District No. 13*, 38 S. W. 861, 18 Ky. L. 387; *Reynolds* v. *Foster*, 66 Misc.

133, 123 N.Y.S. 273; *Butman* v. *Jones*, (Tex. Civ. App.) 24 S. W. (2d) 796. This rule likewise applies to mandamus. *Jenkins Bros. Shoe Company* v. *Travis*, 168 N. C. 589, 845 E. 1036. The appellees had no opportunity to raise this question in the state court since all proceedings below were *ex parte*.

Where both federal and non-federal questions are properly raised in the record but no opinion is delivered by the highest state court in rendering its judgment or the opinion is ambigious, the Supreme Court ordinarily presumes the decision is based on a non-federal ground raised in the record which may be adequate to support it. This presumption grows out of the principle that there must be some affirmative showing in the record that a federal question was presented to the state court and that a decision on such question was necessary to a determination of the cause. When this is not clearly indicated, especially because of the presence of an adequate non-federal ground, the Court has declined jurisdiction. *Lynch* v. *New York at the Relation of Pierson*, (1934), 293 U. S. 52, 54, 79 L. Ed. 191; *Adams* v. *Russell*, (1912) 229 U. S. 353, 358, 57 L. Ed. 1224; *Woods* v. *Niersthiemer*, (1945) 328 U. S. 211, 90 L. ed. 1177; *Phyle* v. *Duffy*, (1947) 334 U. S. 431, 92 L. Ed. 1494; *Williams* v. *Kaiser*, (1944) 323 U. S. 471, 477, 89 L. ed. 398.

While a federal question may be raised in this record, a non-federal question is likewise raised which is adequate to support the judgment of the state court. It is quite apparent from the opinion of the Judge of the Circuit Court of Kanawha County, that his decision was based upon the lack of authority of The Board of Education to do what appellants seek to compel ap-

pellees to do. There being an independent non-federal question sufficient to sustain the judgment of the Supreme Court of Appeals and the Supreme Court of Appeals not having stated the grounds for its decision, the Court will not take jurisdiction. *Lynch* v. *People of New York on Relation of Elizabeth Pierson*, (1934) 293 U. S. 52, 79 L. Ed. 199; *Williams* v. *Kaiser* (1944) 323 U. S. 471, 477, 89 L. Ed. 398. In the latter case the Court said:

> "It is suggested, moreover, that for all we know the denial of the petition by the Supreme Court of Missouri rested on adequate state grounds. It is a well established principle of this court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. *Honeyman* v. *Hanan*, 300 US 14, 18, 81 L. Ed. 476, 478, 57 S. Ct. 350;*Lynch* v. *New York*, 293 US 52, 79 L ed 191, 55 S Ct 16. And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the court will not undertake to review it. *Klinger* v. *Missouri*, 13 Wall. (US) 257, 263, 20 L ed 635, 637; *Walter A. Wood Mowing & Reaping Mach. Co.* v. *Skinner*, 139 US 293, 297, 35 L. Ed. 193, 195, 11 S Ct 528; *Allen* v. *Arguimbau*, 198 US 149, 154, 155, 49 L. ed 990, 993, 25 S CT 622; *Lynch* v. *New York* 293, US 52 L ed 191, 55 S Ct 16, supra. We adhere to those decisions."

IV. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The appellees deny that any substantial federal question is presented by this appeal.

The appellants vaguely contend that under the provisions of the First and Fourteenth Amendments to the Constitution of the United States they are entitled to use public school buildings as a place of worship and rely upon such cases as *Murdock* v. *Pennsylvania*, 319 U. S. 105, upholding the right to distribute religious pamphlets in the streets; *Jamison* v. *Texas*, 318 U. S. 413, relating to the right to distribute religious literature from door to door; *Niemotko* v. *Maryland*, 340 U. S. 268 and *Fowler* v. *Rhode Island*, 345 U. S. 67, involving the right to hold a religious demonstration in a public park. Each of these cases may be distinguished from the present case. No one of these cases involved the right to use a public school building for religious meetings or services. In each case there was no contention that religious meetings could not be lawfully held in the streets and parks if proper permits were first obtained. However, the statutes requiring the license or permit specified no grounds for the refusal of the permit and set up no standards by which the licensing authority was to be guided.

These appellants do not seek to use public streets or public parks for the purpose of holding a religious meeting but assert a constitutional right to use the public school buildings of Kanawha County for the purpose of conducting their religious meetings and services therein. Boards of education were created by the Legislature with the idea that they should carry out an act

included within the governmental power, i. e., the education of the children of the county. Each county board of education may acquire property which is to be used only for the purposes germane to the object for which it is created. *Herald* v. *Board of Education*, (1909) 65 W. Va. 765, 771, 65 S. E. 102. Religious meetings cannot be considered among the purposes for which a public school building is erected.

The appellants in their jurisdictional statement ignore the plain meaning of the West Virginia statute and, in an effort to bring in *Murdock* v. *Pennsylvania*, *Jamison* v. *Texas*, *Niemotko* v. *Maryland*, *Fowler* v. *Rhode Island*, and other cases involving the right of Jehovah's Witnesses to distribute their literature, have attempted to transform public school buildings into "public civic center buildings" open to all who may desire to use them for all purposes.

There is no inherent right in any citizen or in any group or religious organization to use school buildings for any other purposes than those devoted to public schools. The Legislature of West Virginia may prohibit all nonscholastic uses of school buildings or may permit only certain classes of organizations to make nonscholastic use of such buildings. *Baggerly* v. *Lee*, (1905) 37 Ind. App. 139, 73 N. E. 921; *Coughlin* v. *Chicago Park District*, (1936) 364 Ill. 90, 4 N. E. (2d) 1, 9; *State ex rel. Griesinger et al* v. *Grand Rapids Board of Education*, 88 Ohio App. 364, 100 N. E. (2d) 294, appeal dismissed 153 Ohio St. 474, 93 N. E. (2d) 393, certiorari denied 71 S. Ct. 51, 340, U. S. 820, 95 L. Ed. 603, rehearing denied 71 S. Ct. 733, 341 U. S. 917, 95 L. Ed. 1353; *Davis* v. *Massachusetts*, (1896) 167 U. S. 43, 47, 42 L. Ed. 71. The First

Amendment does not guarantee to everyone the right to use any public place at any time for discussion and instruction. *Poulos* v. *New Hampshire*, 345 U. S. 395, 405, 97 L. Ed. 1105. The Fourteenth Amendment does not have the effect of creating a right in a citizen to use public property in defiance of the constitutions and laws of the state. *Davis* v. *Massachusetts*, 167 U. S. 43, 47, 42 L. Ed. 71.

The use of public funds or property for religious purposes can never be considered slight or inconsequential as appellants' state. If these appellants are entitled to use the public school buildings for their religious services, by force of the same argument all other religions, religious groups and sects must be given the same right. The appropriation of public school buildings to religious use then becomes a very great burden. Any religious group or sect could demand the right to use the public school buildings at any time they were not being used for school purposes. This certainly would amount to the use of tax supported public school buildings for religious purposes. The Legislature of West Virginia apparently foresaw the possibility of such a result and in 1919 when it revised the school law withdrew from county boards of education the power and authority to permit the use of public school buildings for religious meetings. The question here is not one of discrimination but of legal right under state law, whether a board of education has the power and authority under state law to grant appellants' demand. Clearly it does not have that power and authority. No substantial federal question thus exists.

The West Virginia statute is not discriminatory. It simply defines and enumerates the nonscholastic uses

to which school buildings may be put. The right of any person or organization to use the public school buildings for nonscholastic purposes is not granted or denied upon the basis of any religious test or upon the basis of the particular beliefs of that person or organization. The Legislature of West Virginia did not see fit to include religious meetings and services among the nonscholastic uses permitted of school buildings. All religions are treated alike by the statute. None are permitted to use school buildings for religious meetings or services. This is not a violation of the First and Fourteenth Amendments.

This Court held in *State ex rel. McCollum* v. *Board of Education*, (1947) 333 U. S. 203, 92 L. Ed. 649, and *Everson* v. *Board of Education*, (1947) 330 U. S. 1, 91 L. Ed. 711, that the use of tax supported property for religious purposes was barred by the First Amendment and that a state cannot use tax supported public school buildings for the dissemination of religious doctrines, saying:

> "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly,

> participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.' "

To permit religious organizations the use of public school buildings for holding their religious services or for the dissemination of and expounding of their doctrines and beliefs is certainly a use of tax supported school property to aid religious groups spread their faith.

Appellants state that it is immaterial that the Constitution and laws of West Virginia prohibit the use of school buildings for religious purposes. They assert that because The Board of Education has permitted others to use school buildings for religious purposes, it is estopped from asserting that constitutional and statutory provisions prohibit the use of school buildings for such purposes.

This is a novel assertion. In effect it is a contention that a sovereign power may be estopped by the unlawful or *ultra vires* acts of its officers or agents. It must be conceded that the appellees are without power or authority to permit the use of school buildings under their control for religious meetings, since the state court so found. If, as appellants alleged, appellees have permitted such use, they committed an unlawful act. The granting of such permission was an *ultra vires* act. It is a well established principle that a public officer can create no rights against the state or other public authority represented by him by his unlawful or *ultra vires* acts. The public whether exercising its functions as a state or federal government, or through

county, town, or other governmental agency cannot be estopped by unauthorized acts, admissions or conduct on the part of their officers and agents. *State* v. *Chilton*, (1901) 49 W. Va. 453, 39 S. E. 612; *Beckley* v. *Wolford*, (1927) 104 W. Va. 391, 140 S. E. 344; *Vicksburg Railway Company* v. *Dennis*, (1885) 116 U. S. 665, 29 L. Ed. 770; *Utah Power and Light Company* v. *United States*, (1922) 243 U. S. 389, 67 L. Ed. 791.

As pointed out in *Beckley* v. *Wolford*, 104 W. Va. 391, 140 S. E. 344, "If acts of indifferent and recreant public servants could estop the state in the exercise of its sovereignity, in a few years it would so limit its power that it could not exercise the functions of government."

And in *Utah Power and Light Company* v. *United States*, (1922) 243 U. S. 389, 67 L. Ed. 791, the Court said of an asserted estoppel against the United States:

> "On this it is enough to say that the United States is neither bound or estopped by acts of its officers or agents to enter into an arrangement or agreement to do or cause to be done what the law does not sanction or permit."

If, as the appellants allege, the Board of Education has permitted other religious organizations to hold religious meetings and services in public school building, the granting of such permission is unlawful and exceeds the Board's authority.

The remedy is not mandamus to compel the Board of Education to commit a further unlawful act in favor of the appellants but rather an injunction to prohibit

a further unlawful granting of permission to use public school buildings for unauthorized meetings. The Supreme Court of Appeals of West Virginia has expressly held that an injunction will lie in such a case. In *Herald* v. *Board of Education*, (1901) 65 W. Va. 765, 65 S. E. 102, the state court said:

> " 'The letting of property belonging to a municipal corporation for any unauthorized uses will be enjoined at the suit of resident tax payers; and the use of a school house for religious worship, when not expressly authorized, is held to warrant the granting of an injunction to restrain the officers of the school district for permitting such use at the suit of a tax payer, without his showing special damage, since he is without means of redress at law. School officers may be enjoined from leasing a public school house for the purpose of keeping a private school, and the use of a public school house for private purposes, such as the holding of religious or political meetings, social gatherings and the like, is unauthorized by law and may be restrained at the instance of any party injured thereby.' "

It is respectfully submitted that the judgment of the Supreme Court of Appeals of West Virginia as well as the judgment of the Circuit Court of Kanawha County, West Virginia, rest on an adequate non-federal basis; that the federal questions raised by the appellants were not decided or passed on by the Supreme Court of Appeals of West Virginia; and that a decision on the federal questions raised by appellants was not necessary to a determination of this cause.

It is further submitted that this appeal is not within the jurisdiction of the Court, because it is not taken in

conformity to the provisions of 28 U.S.C.A. 1237(2) and does not present a substantial federal question.

Wherefore, appellees respectfully move that the within appeal be dismissed.

Respectfully submitted,

JOHN O. KIZER
W. M. WOODROE
Counsel for Appellees

FILED
NOV 9 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1955

No. 438

H. E. WHITE, CHARLES R. HALL, JENNINGS LILLY, W. C. WHITE and JOHN RONCAGLIONE,

Appellants,

vs.

ALBERT ANSON, JR., H. M. BEDDOW, A. S. THOMAS, JR., H. G. KENNEDY and DR. H. R. GLASS, MEMBERS OF THE BOARD OF EDUCATION OF KANAWHA COUNTY, WEST VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

APPELLANTS' REPLY TO MOTION TO DISMISS

HAYDEN C. COVINGTON,

Counsel for Appellants.

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MAY IT PLEASE THE COURT:

Now come the appellants in reply to the motion to dismiss and show the Court as follows:

I.

It is submitted by appellees that appeal is not a proper remedy because mere discriminatory enforcement of the law is alleged and the statute is not attacked. (See pages 3-6 of the motion to dismiss.) An examination of the record

reveals that the allegations were sufficient to show appellants contended that the unequal administration of the law denied them freedom of assembly guaranteed by the First Amendment, contrary to the Fourteenth Amendment.—See the jurisdictional statement at pages 8-11.

The case in this respect is similar to *Martin* v. *Struthers,* 319 U. S. 141 (1943); *Jamison* v. *Texas,* 318 U. S. 413 (1943); *Largent* v. *Texas,* 318 U. S. 418 (1943); *Marsh* v. *Alabama,* 326 U. S. 501 (1946); and *Tucker* v. *Texas* 326 U. S. 517 (1946). But, if the Court reaches the conclusion that the allegations do not constitute an attack on the statute, then the appeal papers should be treated as a petition for writ of certiorari, and as such granted. (43 Stat. 936, 938; 28 U. S. C. § 2103) This was done in *Cantwell* v. *Connecticut,* 309 U. S. 626, 310 U. S. 296 (1940).

II.

It is suggested at pages 13-16 of the motion to dismiss, contrary to the law of West Virginia, that the constitution of that state prohibits religious organizations from using public property for religious meetings. This is not now the law of West Virginia and never has been the law of that state.

The constitutional provision involved is quoted at the top of page 14 of the appellees' motion to dismiss. A reading of the provision fails to show any separation clause and there is nothing in it that implicitly prohibits public property from being used for religious purposes. The West Virginia Constitution provides for the exemption of places of public worship from taxation by the state. Uniformly throughout the state other state property similar to school auditoriums, the National Guard armories and the municipal auditoriums of cities in the state, is used for religious assemblies.—See the exhibits attached to the petition for writ of mandamus.

The Constitution of West Virginia has been interpreted by the state legislature as not prohibiting religious assem-

blies on public property. Section 62 of Chapter 45 of the Barnes Code of 1916 (West Virginia), quoted on page 11 of the motion to dismiss, specifically provided for religious meetings on school property in the state. Had the constitution of the state prohibited it the legislature of the state would not have specifically authorized it by that explicit provision.

The administrative interpretation put on the West Virginia Constitution by the appellees and the other school boards of the state supports the contention here made: that the state constitution does not prohibit religious meetings on school property. Throughout West Virginia it is a common practice of school boards, under the statute in question, to grant permission to various religious organizations to hold religious meetings on school property.

At no time in the history of the judiciary of West Virginia has it been held by any court that the Constitution of West Virginia prohibits religious meetings on school property. The appellee suggests (at pages 13-16) that the courts have so held. But no decision from West Virginia is cited to support the suggestion. *Herald* v. *Board of Education,* 65 W. Va. 765, 767, 65 S. E. 102, is cited and quoted from at page 15. No language of this opinion even intimates such a conclusion. That case did not involve the question. There the school board leased school property conveyed to it for school purposes for oil and gas exploration. The Supreme Court of West Virginia held that the lease was not valid without legislative authority. The dictum quoted from that case on page 15 of the motion to dismiss deals with legislative authority. Nowhere therein does the opinion suggest that the Constitution of West Virginia prohibits the use of school property for religious purposes. This dictum the legislature later met by passing Section 62 of Chapter 45 of the Barnes Code of 1916.

Appellees mention a majority rule of other states construing other state constitutions, which, it is said, condemns religious assemblies on school property. (See pages 14-15.)

The same number of courts, if not more, of other states have reached the opposite results. (See pages 15-16 of the jurisdictiona' statement.) But whatever may be the rule in other states, it is certain that the West Virginia Constitution has not been judicially construed as prohibiting religious assemblies on state property. The legislative and the administrative constructions of the document are that the state constitution does not prohibit such assemblies on such property. The suggestion made by the appellees is, therefore, not correct.

III.

It is contended by appellees that the provisions of the 1931 Code of West Virginia repealed the uses permitted to be made of school property provided by the Barnes Code of 1916. (See pages 6-12 of the motion to dismiss.) A reading of the two different code provisions at pages 10-11 of the motion does not show such an intent. The 1916 Code provided for a limited specified use. A much broader specified use is provided in the 1931 Code without confining the use provided in the earlier code.

Under the present code provisions the school boards still have authority to permit the school auditoriums to be used for religious assemblies, as in the earlier code. The administrative interpretation of the present code by the appellees in letting the property out to all other religious organizations but Jehovah's Witnesses proves the authority.

The present code provisions authorize "the free, comfortable and convenient use of any school property to promote and facilitate frequent meetings and associations of the people for discussion, study, recreation and other community activities. This part of the 1931 Code has a very broad and general meaning, and there is no suggestion of restriction or limitation. Such authority is broadened further by authorizing the provision of "facilities for dissemination of information useful on the farm, in the home, or in the community."

Matters concerning God, eternal salvation, good morals, fair dealings and upright living, even though springing from religion, are suitable for discussion or study at "frequent meetings and associations of the people." The "dissemination of information" on such subjects is useful "in the home, or in the community."

The use of such broad language in the statute shows an intent, not to limit the types of meetings formerly authorized by the 1916 Code, but to broaden the use of school auditoriums. The 1931 Code did not specifically prohibit religious use of school property. The failure to specify "religious" use and "political" use in the 1931 Code is not equivalent to a prohibition of such use. The 1931 Code merely provided a broad and unlimited discretion in the school boards in authorizing them to say whether or not they would lease out school property for religious and political meetings. The 1931 Code left the scope of the use to be permitted of the school property entirely up to the school boards without any specific grant of use for religious purposes, as did the 1916 Code.

Since the 1931 Code, if the school boards want to let their schools be used for religious purposes, they may do so and it is up to the particular school board. It is no longer the business of the legislature to say what each school shall do. The legislature by not specifying religious and political use in the act intended to leave it to the judgment of each school board by the general terms of the act to say whether or not its property could be used for religious or political meetings. A school under the new statute can keep out all religious meetings. It can keep out all political meetings. Board members, according to their discretion, can allow religious meetings or political meetings or both under the new statute.

Neither the trial judge nor the Supreme Court of Appeals can be said to have definitely decided the case because of a repeal of the uses permitted by the 1916 Code when the 1931 Code was passed. The trial judge said: "This,

however, is debatable." He then added that the matter was uncertain "in the absence of a decision by the Supreme Court of Appeals." He then assumed for purpose of argument that if the statute did permit religious use "the granting of such use rests largely within the discretion of the school authorities."—See the jurisdictional statement at pages 26-27.

The Supreme Court of Appeals did not say on what ground it refused the original application for writ of mandamus. No opinion was written. It may well be that such court refused the writ because of a belief that the discretion of the school board was absolute and that it had the power to permit religious organizations to use the school and the unlimited discretion to discriminate between religious groups in the use of the building. This is itself a federal question.

With no opinion from that court there is nothing now before this Court to guide it in deciding whether the so-called nonfederal question is independent from the federal question of discrimination. If the Supreme Court of Appeals refused the writ, as it may have done, because of the unlimited discretion of the appellees to discriminate against Jehovah's Witnesses and in favor of other religious organizations, as they do, then the so-called nonfederal question in this case is itself a federal question or it is so confused and mixed up with the federal question of discrimination that it is impossible to separate them.

It should be remembered that the order of the Supreme Court of Appeals is not one made upon a review of the decision of the Circuit Court. No appeal was taken from that decision. Under the state practice the denial by the Circuit Court authorized the appellants to file an original application in the Supreme Court of Appeals. Because of the *de novo* and *ex parte* nature of these proceedings in the highest court of the state the case is entirely unlike a judgment affirming without opinion a trial court that wrote an opinion. In such a case the opinion of the trial court

throws some light on the ruling of the highest court. But here the nonfederal reasons stated by the Circuit Court may not have been the reasons of the Supreme Court of Appeals. The failure of the Supreme Court of Appeals to write an opinion should not be made the basis of an affirmative finding by this Court that all or any one of the different nonfederal grounds relied upon by the appellees were relied upon by the highest court of the state in refusing the original application.

It requires speculation by this Court to say that the order of the Supreme Court of Appeals rests exclusively on one or all of such grounds. It is equally fair to speculate that the highest court of the state relied upon the ground of absolute unreviewable discretion to discriminate between religious organizations—itself also a federal question. The right to exercise discretion is mentioned in the opinion of the Circuit Court.—See the jurisdictional statement at page 27.

In the face of the record the doubt should be resolved in favor of appellants. This Court should, therefore, conclude that the order appealed from does not rest on an adequate and wholly independent nonfederal ground. This Court has said that "it will be presumed that the State Court based its judgment on the law raising the Federal question, and this court will then take jurisdiction."—*Klinger* v. *Missouri,* 13 Wall. 257, 263 (1871); *Williams* v. *Kaiser,* 323 U. S. 471, 477 (1944); and *Nielson* v. *Lagow,* 12 How. 98, 110 (1851).

In *Williams* v. *Kaiser,* 323 U. S. 471 (1944) (dictum quoted from by appellees at page 18 of the motion to dismiss), the facts are identical with the facts in this case insofar as the nonfederal question is concerned. There the petitioner got his petition for habeas corpus in the Supreme Court of Missouri dismissed without a hearing. It was contended, as it is here, that petitioner failed to state a cause of action. The Supreme Court of Appeals in this case entered its final order dismissing the petitioner

because it was "plainly right" to do so. The petition in the *Williams* case, as in this case, alleged the unconstitutional denial of a federal right. The Court in that case refused to dismiss because of a nonfederal question. The same ruling on the jurisdictional question in this case should be made here.

The decision of the court below is not sufficiently "broad to maintain the judgment" below without reference to the federal question of discrimination. (*Murdock* v. *Memphis,* 20 Wall. 590, 636 (1873); *Hale* v. *Akers,* 132 U. S. 554, 564-565 (1889)) The so-called nonfederal question of discretion to say who shall use the school auditorium in this case is so "intermingled with that of Federal right that the former cannot be considered as an independent matter." (*Moral* v. *Horsky,* 178 U. S. 205, 208 (1900); *Bacon* v. *Texas,* 163 U. S. 207, 226-228 (1896)) This confusion of the federal question of unequal administration of the law with the state question is such as "to make it necessary, in order to pass upon the Federal question, to analyze the facts." —*Fiske* v. *Kansas,* 274 U. S. 380, 385-386 (1927).

Assume that this Court concludes that the ambiguity as to the likely grounds of the decision by the Supreme Court of Appeals will remain after the case has been taken in for review and that this Court does not desire to resolve the ambiguity, then this Court should vacate the order appealed from and remand the case back to the Supreme Court of Appeals for further consideration and clarification of the reasons for its final order when it said "plainly right."—*Minnesota* v. *National Tea Co.,* 309 U. S. 551 (1940); *State Tax Commission* v. *Van Cott,* 306 U. S. 511 (1939); *Chicago* v. *Willett Co.,* 341 U. S. 913 (1951); but compare *Dixon* v. *Duffey,* 344 U. S. 143 (1952), at page 147.

CONCLUSION

It is respectfully submitted that this Court should note jurisdiction in this case or consider the appeal papers as

a petition for writ of certiorari and grant the writ, unless the Court cannot resolve the ambiguity of the decision of the court below as to the adequacy of the nonfederal question; in which event the order ought to be vacated and the case remanded to the court below for further consideration and clarification of its final order.

Respectfully,

HAYDEN C. COVINGTON,

Counsel for Appellants.

November, 1955.